FILED
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CAPITAL CASE

No. 97-1940

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

ROBERT CRUZ MCLAIN, *Respondent*,

ON PETITION FOR WRIT OF *CERTIORARI* TO THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

RESPONDENT'S *SUPPLEMENTAL* OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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Pursuant to Rule 15.8, Respondent McLain *supplements* his Opposition to the pending Petition for Writ of *Certiorari*.

I. A Supplement From Respondent Pursuant to Rule 15.8 is Now Warranted

A brief supplement from Respondent is warranted at this juncture because Petitioner (in Reply) has "rephrased" the Questions Presented *and* offered new arguments along with more than a hundred pages of record excerpts never included in the original Petition and Appendix. Further, a supplement is warranted so that Respondent can bring to this Court's attention a recently decided case that supports (and follows) the decision below, while reducing the number of other "open" cases possibly impacted by the decision below to a universe of *one*.

II. With the Ninth Circuit's Very Recent Decision in *Coleman v Calderon*, There is Now Only *One* Case Awaiting Decision in Courts Below That Could Be Affected by a Grant or Denial of *Certiorari* in This Case

The precedential effect of the decision below is *very* limited. Here's why. The decision below expressly follows ***Hamilton v. Vasquez***, 17 F.3d 1149 (9th Cir.,1994) *cert.* den. 512 U.S. 1220, rehearing den. 512 U.S. 1270 (1994). In an unsuccessful effort to obtain *cert.* review in ***Hamilton***, *supra*, this same Petitioner told this Court that the jury instruction scrutinized in ***Hamilton*** also was given in three other California capital cases that then remained open.[1] Those *three* other cases (identified by name in the Warden's *cert.*

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[1] In ***Hamilton***, Petitioner argued that unless this Court granted *cert.*, courts then hearing the other three pending California cases would be bound by the Ninth Circuit's decision in ***Hamilton***. (*See* Warden's "Petition for Writ of *Certiorari*" at 18 in ***Calderon v. Hamilton***, United States Supreme Court No. 93-1652, *cert.* den. 512 U.S. 1220 (1994).

petition in ***Hamilton)*** were: (1) *this* case (then pending on federal *habeas* in the Central District of California); (2) ***Coleman v. Calderon*** , 998 U.S. App. LEXIS 17074 (9th Cir., July 28, 1998) (then pending on federal *habeas* in the Northern District of California); and (3) ***People v. Whitt,*** 51 Cal. 3d 620 (1990) (still pending on federal *habeas* in the Central District of California as ***Whitt v. Calderon*** (94-CV-07960).

The Ninth Circuit's decision in *this* case (***McLain v. Calderon***, 134 F.3d 1383 (9th Cir.,1998) reduced the number of open cases controlled by ***Hamilton*** from three to two. Now, with the Ninth Circuit's very recent decision in ***Coleman v. Calderon*** , 998 U.S. App. LEXIS 17074 (9th Cir., July 28, 1998) (also following ***Hamilton***), only ***Whitt v Calderon*** awaits a decision below. Thus, with the Ninth Circuit's very recent decision in ***Coleman v Calderon***, *supra*, the number of other "open" cases possibly impacted by the rule in ***Hamilton***, *supra* has been reduced to a universe of *one*.

III. Petitioner Is Now Asking this Court to Overturn a Factual Finding

In his newly "clarified" and restated Question Presented #2, Petitioner argues that ***Simmons v South Carolina,*** 512 U.S. 154 (1994) does not apply if the prosecution has not argued "future dangerousness." But Petitioner then concedes that the district court expressly found that the prosecution *did* argue "future dangerousness" to the penalty phase jury in this case. Therefore, Petitioner (in Reply) now asks that this Court overturn the district court's *fact finding*, arguing that it was a "non-specific conclusion...not supported by the record." (Reply at 2). [2]

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[2] Indeed, recognizing that he is asking this Court to draw different findings from the record, Petitioner has (in his Reply) attempted to supplement the original Appendix with more than a hundred pages of *new* record excerpts.

What the prosecution did or didn't do at trial is a question of *fact*. And on this point, the District Court's conclusion was specific, detailed, and amply supported by express and extended references to the record. Over the course of nearly five pages of detailed findings, the District Court's Memorandum Opinion repeatedly cites to and quotes from the record in support of its conclusion that the Prosecution *did* argue to the penalty phase jury that Respondent "would always pose a constant danger so long as he remained alive." (District Court's "Memorandum Opinion" at 100, Exhibit "B" to Petitioner's Appendix).

In this case, the District Court specifically found that the prosecution *did* argue "future dangerousness." Thus, absent a ruling that the District Court's fact finding was unsupported by the record, *this* case does not even present the question asserted by the Petitioner.

IV. The Ninth's Circuit 1994 Decision in *Hamilton* is *Not* "In Conflict With" This Court's 1994 Decision in *Simmons*

For the first time, the Warden now argues that the Ninth Circuit's 1994 ruling in ***Hamilton v. Vasquez,*** 17 F.3d 1149 (9th Cir.,1994) *cert.* den. 512 U.S. 1220, rehearing den. 512 U.S. 1270 (1994) is somehow "in conflict with" this Court's ruling in ***Simmons v South Carolina,*** 512 U.S. 154 (1994). [Petitioner's Reply at 5-6]. That argument is wholly without merit.

Simmons and ***Hamilton*** are entirely consistent. In ***Simmons***, *supra*, this Court overturned a death sentence on the grounds that a penalty phase jury instruction confused and misinformed the jury about the defendant's parole eligibility status. ***Hamilton,*** *supra* is in accord. In ***Hamilton***, the Ninth Circuit granted *habeas* relief and vacated a death

sentence previously upheld by the California Supreme Court, explaining that the petitioner's penalty phase jury had been given an erroneous and misleading instruction regarding the governor's power to commute a sentence of life without possibility of parole. That jury instruction (long-since abandoned by the State) tended to suggest that unless the defendant were condemned to death, he might eventually be released.

This Court's June, 1994 decision in ***Simmons*** and its denial of *cert.* in ***Hamilton*** occurred within a matter of days.[3] If, as Petitioner now suggests, ***Hamilton*** was somehow inconsistent with ***Simmons***, this Court could have remanded ***Hamilton*** in light of ***Simmons***. That didn't happen. Instead, immediately, after handing down its decision in ***Simmons,*** this Court denied *cert.* in ***Hamilton*** and two months later, denied rehearing as well, thereby upholding the decision.

V. The Warden's Eleventh-Hour Effort to Overturn *Hamilton* in this Case Should *Not* be Entertained

In arguing that ***Hamilton*** is somehow "in conflict with" ***Simmons,*** Respondent is now making a wholly new contention – one *never* made to *any* of the courts below nor even to this Court in his original *cert.* petition in this case. A contention made for the first time in a *Reply* brief in support of a *cert.* petition, should *not* be entertained by this Court.

If Petitioner wanted this Court to review the rule in ***Hamilton*** in light of in its earlier decision in ***Simmons***, that issue could and should have been raised, in the first instance, in the *cert.* petition *in* ***Hamilton*** *itself.* Alternatively, if Petitioner wanted to

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[3] ***Simmons v South Carolina,*** 512 U.S. 154 (1994) was handed down on June 17, 1994. Three days later (on June 20, 1994), this Court denied this Petitioner's *cert.* application in ***Hamilton v. Vasquez,*** *cert.* den. *sub nom* ***Calderon v. Hamilton,*** 512 U.S. 1220 (1994). On August 20 1998, this Court denied rehearing *sub nom* ***Calderon v. Hamilton,*** 512 U.S. 1270 (1994).

litigate *in this case* the question of whether ***Hamilton*** was in conflict with ***Simmons***, Petitioner should have made that argument in the courts below. No such argument was ever made. Rather, in the courts below, the Warden simply attempted to distinguish this case (***McLain***) from the facts and circumstances in ***Hamilton.*** That effort to factually distinguish ***Hamilton*** was decisively rejected by the Ninth Circuit in its decision below.

Had the Warden wished to do more than attempt to distinguish ***Hamilton*** and preserve the issue of ***Hamilton's*** alleged inconsistency with ***Simmons*** for review here, the State could have and should have made that argument below or at the very least, in the Petition for Certiorari to this Court. Indeed, Petitioner has not simply made this a *new* argument in Reply, Petitioner's new argument actually *contradicts* a position taken in his original *cert.* petition, wherein Petitioner asserted that the Ninth Circuit's decision below had decided "an important question of law that has *not* been, but should be, decided by this Court." (Writ Petition at 14) (emphasis added).

CONCLUSION

The opinion below is neither controversial nor precedentially significant. No fewer than *four* different federal court judges, representing a broad spectrum of judicial opinion, reviewed the matter and *all* concurred that penalty phase *habeas* relief was warranted. There was no dissent from the Ninth Circuit's panel opinion affirming the District Court's order granting penalty phase *habeas* relief. When Petitioner sought re-consideration by the full Ninth Circuit, not a single active member of that Court considered the matter worthy of *en banc* review.

As this case is neither controversial nor precedentially significant, it raises *no* issues worthy of this Court's discretionary review. For these reasons and for all of the reasons set forth in the District Court's carefully wrought Memorandum Opinion and the Ninth Circuit's published opinion (Petitioner's Appendix A and B), Respondent McLain asks that this Court ***deny*** the Petition for *certiorari*.

Respectfully submitted,

ROBIN M. SHAPIRO

DATED: September 22, 1998

By: _____
Robin M. Shapiro
Counsel for Respondent
ROBERT CRUZ McLAIN

Certificate of Service

I, Robin M. Shapiro, do hereby declare and state:

I am a member of the State Bar of California, admitted to practice before the Federal District Court for the Central District of California and the Ninth Circuit Court of Appeals.

I am counsel of record for Respondent in *Calderon* v *McLain*. I was appointed as counsel of record by the Honorable John G. Davies, United States District Court Judge (Central District of California) pursuant to the Criminal Justice Act (18 U.S.C. § 3306A). Since then, I have served as Respondent's court-appointed counsel in all proceedings below.

On September 22, 1998, I served a photocopy of **RESPONDENT'S *SUPPLEMENTAL* OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*** on Petitioner's Counsel of Record by mailing it (*via* United States first class postage paid) addressed as follows:

Keith H. Borjon
Supervising Deputy Attorney General
California Attorney General's Office
300 South Spring Street
Los Angeles, California 90013

Dated: September 22, 1998 at New York, New York.

The foregoing is true and correct of my own personal knowledge.

Robin M. Shapiro
Counsel for Respondent